

“Extraordinary Worker Visas for Business Immigration” by Adam Edward Rothwell, Esq.

There is a maximum annual limit on the number of foreign professional workers that may receive H-aB Professional Visas at US businesses. However, there is no annual limit on the number of O-1 Visas that may be issued to US employers on behalf of foreign citizens with extraordinary ability. As a result O-1 Visa sponsorship by US employers on behalf of foreign citizens with needed extraordinary ability provides a substantial opportunity for US businesses to hire the best and brightest foreign employees with needed skillsets.

Requirements that must be met for a foreign citizen to qualify for an O-1 Visa for business

Foreign citizens with extraordinary ability in many different areas including but not limited to the arts, sports and business may all qualify for O-1 Visas. There are different requirements depending on the area of extraordinary ability, but to sponsor a foreign worker on an O-1 Visa, the foreign worker must have a specific extraordinary ability and the sponsoring employer must show it needs the extraordinary ability specifically held by the foreign worker. In other words, a telecom firm could not successfully sponsor a potential foreign worker with extraordinary ability in archeology for an O-1 Visa, even if the potential foreign worker who held extraordinary ability in archeology also had experience in telecom.

That being said O-1 Visa requirements for a foreign citizen with extraordinary ability in business must have either either received an internationally recognized major award or must be able to meet at least three of the following criteria:

- Receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor
- Membership in associations in the field for which classification is sought which require outstanding achievements, as judged by recognized national or international experts in the field
- Published material in professional or major trade publications, newspapers or other major media about the beneficiary and the beneficiary’s work in the field for which classification is sought
- Original scientific, scholarly, or business-related contributions of major significance in the field
- Authorship of scholarly articles in professional journals or other major media in the field for which classification is sought
- A high salary or other remuneration for services compared to others in the field as evidenced by contracts or other reliable evidence
- Participation on a panel, or individually, as a judge of the work of others in the same or in a field of specialization allied to that field for which classification is sought
- Employment in a critical or essential capacity for organizations and establishments that have a distinguished reputation

Of the above different criteria, some are generally considered more important than others for business fields. For example it often really helps if the foreign citizen with extraordinary ability in business has received a high salary compared to others in his/her field, as previous history of receiving a relatively high salary compared to peers at least shows other individuals have likely felt the foreign citizen has extraordinary ability. As an extreme example, if a previous employer paid a foreign software engineer USD300,000 a year in Prague to write complex code, that shows the previous employer at least thought the software engineer had extraordinary ability. Conversely, an application for an O-1 Visa that argues a foreign citizen has extraordinary ability as a software engineer in business for would be relatively weak if the foreign citizen always received a low salary.

Another category that is really important of the above criteria for the O-1 Visa regarding extraordinary ability in business is evidence the foreign citizen has served in a critical or essential capacity for

organizations and establishments that have a distinguished reputation. If a foreign citizen really has extraordinary ability in business, the foreign citizen should be able to satisfy this criteria, as not being able to satisfy this criteria is almost by itself a sign an individual does not have extraordinary ability in business. Still this category is rather subjective, especially as to whether organizations have distinguished reputations. However, the Immigration Service seems fairly accepting when evidence is presented on whether or not an organization has a distinguished reputation.

Along with meeting these criteria, an itinerary must be provided for an O-1 Visa. To receive an O-1 Visa for a foreign worker with extraordinary ability in business, the US business sponsoring the application must usually provide details on the duties requiring extraordinary ability to be performed and the general timeline or performing those duties and functions.

In addition to the above, another requirement for the O-1 visa is a written advisory opinion must be provided from a peer group (including labor organizations) or a person designated by the group with expertise in the beneficiary's area of ability.

This requirement exists to protect US workers, which is a very valuable goal. Also the consultation must be from a US based peer group.

There are fields with unions and bargaining labor organizations, and the Immigration Service requires those organizations to either provide a letter of support or no objection to the application. For example, if a film production in Los Angeles wants to hire a foreign Director on an O-1 Visa for a film, the Immigration Service requires either a no objection letter or a letter of support from both the Directors Guild and the Alliance of Motion Picture and Television Producers. These and other organizations in the arts have specific processes for requesting O-1 consultations. They often have set fees to review and make determinations on whether or not to provide consultation letters, and they are fair in their decision-making. Yet, receiving a consultation from a peer group in a business field is often problematic.

If there is no identifiable peer group, the Immigration Service is not supposed to require a consultation letter in a O-1 Application. It has been my experience though that a peer group consultation letter is almost always required, regardless of the field. And in my opinion requiring a peer group consultation for a visa based on extraordinary ability in a business field is one of the least sensible requirements in all areas of lawful immigration. Since there are seldom unions relating to business fields, this requirement usually results in working the phones by cold-calling random organizations in the field of the employer asking them to review the application and provide a no objection letter to an O-1 Visa for the foreign citizen. The majority of time this is very time-consuming, as usually no one cares.

As an example, say a US investment advisory firm needs to temporarily sponsor a specific foreign worker with extraordinary ability in overseas future markets. To receive an O-1 Visa for the foreign worker, the investment advisory firm needs a peer advisory consultation, which would likely entail contacting US organizations that focus on investment advisory fields. There are usually at most a few possible organizations nationwide in any field but most fields have at least one national organization (even immigration lawyers have the American Immigration Lawyers Association).

Once an organization in the relevant field is identified, someone in that organization must be identified as able and willing to spend their time on evaluating the request for a consultation letter. And for this to be done, the organization often first needs to be advised of even what the request consists of, as potential peer group organizations in business fields are often completely unfamiliar with O-1 Visas and related peer consultation requirements. In these situations usually no one at the potential peer group even cares enough though about the O-1 requirement to waste their time on it.

I once got transferred to eight different people in a potential peer group (in this case a national industry trade organization) regarding an O-1 consultation letter request, as no one at the organization either understood the request and/or wanted to waste their time on it. Eventually someone at the organization just referred me to another national US industry trade organization that did eventually write the consultation letter, but not before telling me in clear terms that US Immigration Law was in error for requiring a waste of time on something no one cared about.

When it comes to business applications, it has been my experience peer organizations seldom mention a concern with protecting US workers and instead often consider the consultation process to just be a waste of their time. Eventually a qualifying consultation letter can almost always be procured in a legitimate application for extraordinary ability in business, but it may take many hours of calls to get anybody to bother with it.

Conclusion

Even with a required peer group consultation component, the O-1 Visa for business provides a strong opportunity for US businesses to hire high level business executives and workers. The Immigration Service currently processes O-1 Visa cases faster than any other work visa application through regular processing, and this visa category does not have an annual limit on the number of potential visas that may be issued. For all these reasons if a US business needs a worker with an extraordinary ability and has identified a foreign worker with that same extraordinary ability, the O-1 Visa is always at least an option worth considering.

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